

FCC MAIL ROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of

Amendment of Section 73.202(b),

Table of Allotments,

FM Broadcast Stations.

(Fortuna Foothills and Wellton, Arizona)

MB Docket No. 03-163

RM-10734

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 12, 2004**Released: March 15, 2004**

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Reconsideration filed by Dana J. Puopolo ("Petitioner") directed to the *Report and Order* in this proceeding.¹ For the reasons discussed below, we deny the Petition for Reconsideration.

Background

2. In response to a Petition for Rule Making filed by the Petitioner, the Audio Division issued a *Notice of Proposed Rule Making* ("Notice")² proposing the allotment of Channel 240A to Fortuna Foothills, Arizona, as the community's first local aural transmission service. In order to accommodate this allotment, the *Notice* also proposed the substitution of Channel 248A for vacant Channel 240A at Wellton, Arizona. The *Notice* requested the Petitioner to submit additional information to demonstrate that Fortuna Foothills is a community for allotment purposes. In this regard, Fortuna Foothills is unincorporated and listed in the 2000 U.S. Census as a Census Designated Place ("CDP") with a population of 20,478 persons. The designation of an area as a CDP raises the presumption that an area is a community for allotment purposes. However that presumption is rebuttable.³ In response to the *Notice*, Petitioner merely stated that Fortuna Foothills is a community for allotment purposes because the Commission has licensed Station KBFY-LP to Fortuna, Arizona, to which the names Fortuna Foothills and Fortuna are interchangeably used.

3. The *Report and Order* noted that the city reference coordinates were different for the areas of Fortuna and Fortuna Foothills, and determined that the two communities were not interchangeable. The *Report and Order* held that the record in this proceeding was insufficient to find that Fortuna Foothills is a "community" for allotment purposes. Petitioner presented no evidence that showed that Fortuna Foothills contained any political, social, economic, commercial, cultural or religious organizations and services that identify themselves with that locality, nor provided testimony from local residents attesting to Fortuna Foothills' community status. The *Report and Order* confirmed that Station KBFY-LP is a LPTV station licensed to Fortuna, Arizona, not Fortuna Foothills. The *Report and Order* went on to state that a LPTV station licensed to a particular community is not a factor when determining an area to be a

¹ See *Fortuna Foothills and Wellton, Arizona*, 18 FCC Rcd 19574 (MB 2003).

² See *Fortuna Foothills and Wellton, Arizona*, 18 FCC Rcd 14373 (MB 2003).

³ See *Stock Island, Florida*, 8 FCC Rcd 343 (M.M. Bur. 1993); *East Hemet, California, et al.*, 4 FCC Rcd 7895 (MMB 1989); and *Hannahs Mill and Milledgeville, Georgia*, 7 FCC Rcd 3944 (MMB 1992).

"community" for allotment purposes because LPTV stations have "secondary spectrum priority" to full-service stations. Moreover, the "fill-in" nature of this secondary service, coupled with the full service allotment scheme, creates a situation where traditional Section 307(b) issues relating to a "community of license" do not exist.

Petition for Reconsideration

4. Petitioner states that while Fortuna Foothills is not incorporated, the area contains a large population grouped together in one place that share common problems and experiences that deserve their own FM radio station. Petitioner states that the residents live in Fortuna Foothills although they shop in Yuma, Arizona. Petitioner contends that the Commission's definition of a community has become so "skewed" that for practical purposes it has become impossible to define. In this regard, the Petitioner also requests that the Commission consider opening a rulemaking proceeding looking for a specific definition of a community.

Discussion

5. Section 1.429 of the Commission's rules sets forth the limited provisions under which the Commission will reconsider a rulemaking action. Reconsideration is warranted only if the Petitioner cites error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior action. Petitioner has not set forth any errors of law or facts, nor had Petitioner presented new facts or changed circumstances that would warrant reconsideration of the *Report and Order*. The *Notice* clearly required the Petitioner to present evidence to show that Fortuna Foothills has social, economic, or cultural indicia to qualify it as a "community" for allotment purposes. Petitioner failed to provide this information. The *Report and Order* did not imply that Fortuna Foothills could not be identified as a "community," but merely made the determination that Fortuna Foothills was not a "community" for allotment purposes based upon the record in this proceeding.

6. In his Petition for Reconsideration, the Petitioner states that the residents of Fortuna Foothills share common problems and experiences. However, no evidence has been presented to demonstrate that Fortuna Foothills is a "community" for allotment purposes. Instead the Petitioner requests that the Commission to clarify the definition of a community. We find that Petitioner's arguments are not well taken. We reject Petitioner's contention that "community" has become impossible to define. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies "..... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings, which have common local interests.⁴ This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. The key ingredient in determining the existence of a community is the presence of a community of interest associated with an identifiable population grouping.⁵ A mere geographical location is not enough since there must be a population with needs that a radio station can address. The principal test is whether the residents function as and conceive of themselves as a community around which their interests coalesce. This may be proven by direct testimony of residents of the locality or by "indicia of community." Incorporation is not a prerequisite to community status. The specified location must be an identifiable population grouping separate and apart from all others, and the geographic boundaries of the location must not enclose or contain areas or populations more logically

⁴ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁵ See *Vimville, Mississippi*, 48 FR 56613, published December 22, 1983.

identified as or associated with some other location.⁶ At this point in time, we find also no need to open a rulemaking proceeding to clarify the definition of a community. Accordingly, we deny the Petition for Reconsideration in this proceeding.

7. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Dana J. Puopolo IS DENIED.

8. IT IS FURTHER ORDERED, That the aforementioned proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

⁶ See *Beacon Broadcasting and New South Broadcasting Corporation*, 104 FCC 2d 808 (R. B. 1986), *app. for review*, 2 FCC Rcd 3469 (1987), *appeal affirmed New South Broadcasting Corp v FCC*, 879 F.2d 867 (D.C. Cir. 1989).